

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO.3006 OF 1983

WITH

SPECIAL CIVIL APPLICATION NO.4174 OF 1983

For Approval and Signature

The Hon'ble Mr. Justice S.K. KESHOTE

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1. Whether reporters of local papers may be allowed to see the judgment ?
  2. To be referred to the reporters or not ?
  3. Whether their lordships wish to see the fair copy of the judgment ?
  4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950, or any order made thereunder ?
  5. Whether it is to be circulated to the Civil Judge?

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SHRI SHIVSHANKAR S. PATHAK & ORS.

VERSUS

THE STATE OF GUJARAT & ORS.

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Appearance:

In SCA 3006/83:

MR ASIM PANDYA, for the Petitioners.

MR JM THAKORE, Advocate General, with

MR MG DOSHIT for Respondents No.1, 2 & 3.

In SCA 4174/83:

MR ASIM PANDYA, for the Petitioners.

MR MG DOSHIT for Respondents.

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Coram: S.K. Keshote,J  
Date of decision:03/03/1997

C.A.V. JUDGMENT

As the facts and grounds which have been taken by the petitioners in these Special Civil Applications are common, the same are being disposed of by this common order. In Special Civil Application No.3006/83, the learned counsel for the petitioner made a statement before this Court that he does not press this Special Civil Application for petitioners No.2, 3, 15, 16 and 19. Writ petition on behalf of these petitioners accordingly stands dismissed.

2. The petitioners in both these Special Civil Applications were engaged as Karkoons in the irrigation scheme relating to Karjan Dam. It is admitted case of the petitioners that they were appointed on daily wages. In Special Civil Application No.3006/83, the petitioners have given the date of their employment. In Special Civil application No.4174/83, the petitioners have given their date of appointment in para-3 of the petition. These writ petitions have been filed by the petitioners challenging therein the action of the respondents to terminate their services. Challenge to the termination has been made by the petitioners in both these Special Civil Applications, on the ground that the same have been made in violation of provisions of Section 25F of the Industrial Disputes Act, 1947 (hereinafter referred to as the 'Act 1947'). The next ground of challenge has been taken that the termination of services of the petitioners is arbitrary and violative of Articles 14 and 16 of the Constitution of India as the termination is stated to be made wholly on arbitrary and perverse reasons. Reply to the Special Civil Applications has been filed by the respondents wherein the details of the working of the petitioners as daily wagers at the Karjan Dam Project has been given. The Court on the last date of hearing of the matters has given a direction to the State government to file a concise statement of actual working days of the petitioners during the period from 21st June 1982 to 20th June 1983 and in compliance of the said direction, further affidavit in reply has been filed by Shri Y.I. Dhundia, Executive Engineer. In Special Civil Application No.4174/83, no such statement has been filed. From the further affidavit filed in the Special Civil Application No.3006/83, it is clear that petitioners

No.1, 6, 8, 10, 13, 15, 16, 17 and 19 have completed 240 days' actual working during the aforesaid period, but as the learned counsel for the petitioner has made a statement that he does not press this petition in respect of petitioners No.2, 3, 15, 16, & 19, in Sp.Civil Application No.3006 of 1983, and the petition so far as these petitioners are concerned is dismissed, it can be said that only the petitioners No.1, 6, 8, 10, 13, & 17 have completed 240 days' actual working. The rest of the petitioners have not completed 240 days actual working during the aforesaid period. This affidavit has not been controverted by the petitioners. The learned counsel for the petitioners contended that as per the chart filed by the respondents, many of the other petitioners have completed 240 days of actual working in the year earlier to the period in dispute and as such, the provisions of Section 25F of the Act 1947 have to be complied with in their cases also. The learned counsel for the petitioners, in support of his contention placed reliance on the following decisions:

1. 1986 GLH 1024 -- P.W.D. Employees' Union  
v. State of Gujarat
2. 1984(II) Lab.IC 974 -- The Kapurthala  
Co-operative Bank Ltd., Kapurthala v.  
The Presiding Officer, Labour Court,  
Jullundur & Ors.
3. 1982 (II) LLJ 186 -- Ramasamuz Upadhyaya  
v. Vinubhai M. Mitra.
4. 1986 Lab.IC 98 : 1985(II) LLJ 539 -- The  
Workmen of American Express International  
Banking Corporation v. The Management of  
American Express International Banking  
Corporation.

3. On the other hand, the learned counsel for the respondents firstly raised a preliminary objection that this Special Civil Application is not maintainable as the petitioners have an efficacious alternative remedy under the provisions of the Act 1947 by way of raising industrial dispute. Carrying further this contention, the learned counsel for the respondents contended that the petitioners are challenging the validity of the termination of their services on the ground of violation of Section 25F of the Act 1947 and in such case, the petitioners have to avail of the remedy provided under the said Act and not this writ petition under Article 226 of the Constitution of India. It has next been contended that otherwise also, the provisions of Section 25F of the

Act 1947 are not attracted in the present case as the construction of dam by the State Government through irrigation department are sovereign functions. It is urged that the provisions of Section 25F of the Act 1947 will be attracted only in case of those petitioners who have worked for 240 days in the twelve calendar months preceding the date of termination and not in the case of those petitioners who have not completed 240 days. It has next been contended that even if it is accepted by this Court that the provisions of Section 25F of the Act 1947 are attracted in the present case, then too the relief of reinstatement may not be granted as the project in which the services of the petitioners were engaged has already been closed in the year 1986. In support of this contention, the learned counsel for the respondents placed reliance on the following decisions of Hon'ble Supreme Court as well as this Court.

1. (1996) 2 SCC 293 -- Chief Conservator of  
Forests & Anr. v. Jagannath Maruti  
Kondhare & Ors.

2. 1993(2) GLR 1490 -- Vinodrai N. Ratnatar  
v. State of Gujarat

3. AIR 1996 SC 1565 -- State of Himachal  
Pradesh v. Suresh Kumar Verma

4. I have given my thoughtful considerations to the submissions made by the learned counsel for the parties.

5. The learned counsel for the petitioners does not dispute the fact that other than petitioners No.1, 6, 8, 10, 13, 16, 17 and 19 the other petitioners have not worked for 240 days during the period from 21st June 1982 to 20th June 1983. It has further been admitted by the learned counsel for the petitioners that the Karjan Project on which the petitioners were engaged on daily wages has been closed after completion of work in the year 1986.

6. On the other hand the learned counsel for the respondents also does not dispute the fact that the petitioners were 'workmen' and the Project on which they have been engaged was 'industry' within the meaning as given to these two terminologies in the Act 1947, in case his contention that construction of the Dam is sovereign function of the State, is not accepted by this Court.

7. In the Special Civil Application No.4174/83, the petitioners have given out their total work from the date

of their appointment to the date of termination to be more than 1100, 800 and 627 days. They have made further specific averment in the Special Civil Application that in this case the provisions of Section 25F have been violated by terminating their services. These facts have not been controverted by the respondents in the reply filed to the Special Civil Applications. In this case the uncontroverted position is that the petitioners have completed 240 days in the twelve calendar months from the date of joining the services. The learned counsel for the respondents in both the cases admitted that before termination of the services of the petitioners compliance of provisions of Section 25F of the Act 1947 have not been made.

8. First of all, I consider it to be appropriate to take two preliminary issues, which have been raised by the learned counsel for the respondents regarding maintainability of these Special Civil Applications.

9. Re.: Availability of alternative remedy.

The action of the respondents of terminating the services of the petitioners has been challenged in both these petitions on the ground of violation of provisions of Section 25F of the Act 1947. So the petitioners are challenging the termination of their services on the ground of violation of statutory provision. It is not in dispute that this statute itself provides a form for redressal of the grievance of the nature made by the petitioners in the present case. I find sufficient merits in the contention of the learned counsel for the respondents that where the petitioners allege breach of a particular provision of statute, then the remedy provided under the said statute, for redressal of the grievances, should have been availed of. In the present case, the petitioners have alternative efficacious remedy available under the provisions of the Act 1947 and as such their approach straightway to this Court under Article 226 of the Constitution, is difficult to appreciate and accepted. In para 12 of the Special Civil Application No.3006 of 1983, the petitioners have stated that they have not other prompt, efficacious alternative remedy except by way of this petition, which is wholly incorrect. In para 6 of the Special Civil Application No.3006 of 1983 as well as in para 9 of the Special Civil Application No.4174 of 1983, the petitioners have clearly indicated that they were aware of the fact of legal position that they have alternative remedy available in the matter by way of raising industrial dispute. The reasons which have been given by the petitioners to by

pass that statutory remedy are as follows:

- (i) the petitioners belong to weaker section of the society;
- (ii) they do not have sufficient means to go for a long drawn out litigation before the authorities constituted under the Act 1947 which would take years together for disposal of their cases and further appeal and ultimate recourse to this Hon'ble Court under Article 226/227 of the Constitution of India cannot be ruled out.
- (iii) driving the petitioners at this particular remedy will result not only in time cost but also in terms of money cost to both the sides.
- (iv) in the said litigation, the petitioners have to spend more than what they may eventually gain.
- (v) it is a case where the statutory provisions have been breached by the respondents and as such, the petitioners are absolutely justified in bringing this petition before this Court in order to get all things right by intervention of this Hon'ble Court.

10. In case the reasons which have been given by petitioners are taken to be sufficient and adequate to by pass or circumvent the statutory remedies provided then in all the cases the statutory alternative remedy provided would render nugatory. The remedy provided under the Act 1947 are cheaper and meant for speedy adjudication of the industrial disputes. I fail to see any justification given, not to avail the alternative remedy, by the petitioners on the ground that they belong to weaker sections of the society. It is not the question to which section of society the petitioners belong. It is a question where statutory remedy is provided for adjudication of industrial disputes with which the petitioners have come up before this Court and as such, the said remedy has to be availed of. The Parliament in its wisdom has considered the remedies provided in the Act 1947, a cheaper and speedy remedy for the labourers (workmen) and the petitioners are unable to give out how that remedy is onerous or costly. Another reason that the petitioners do not have sufficient means to go for a long drawn out litigation before the authorities constituted under the Act 1947 which would take years together for disposal of their cases, is also hardly of any relevance and substance. In the Labour

Court and Industrial Tribunal to which reference of industrial dispute is made, cheaper remedy is provided because there the advocates are not allowed to appear and cases of workmen are to be dealt with either by themselves or through their representatives who may be the office bearers of the workers' Union. It is not the case that the remedy of writ petition is provided free of costs. On the contrary the litigation by way of writ petitions before this Court is costly as the advocates charge fees as well as the other expenses are also heavy in comparison to the litigation before the Labour Court and Industrial Tribunals. Another justification given that the Labour Court or Industrial Tribunal takes years together for disposal of the cases and their decisions are further subject to appeals and ultimate recourse to this Court under Article 226/227 of the Constitution is hardly of any substance. The litigation here in this Court also equally takes long time in disposal thereof. The present cases themselves are example of that. The petitions have been filed in the year 1983 and the same have come up for hearing in the year 1997, i.e. after about 13 years. It is understandable that in case this Court is able to dispose of the matters within few months or within a year, then there may be some justification in the aforesaid saying of the petitioners, but where this Court itself takes years together to decide the matters, how far it is justified for the petitioners to approach this Court directly under Article 226 of the Constitution in case where efficacious alternative remedy has been provided to them under statute. It is not that where the petitions of the year 1983 only are pending before this Court, but still the petitions of the year 1970s and 1980s are pending before this Court. Another grievance that the decision of the Labour Court or Industrial Tribunal is subject to appeal and ultimate recourse to this Court under Article 226 or 227 of the Constitution is concerned, it is suffice to say that the decision of this Court in the petition filed under Article 226 or 227 of the Constitution is also subject to appeal, i.e. L.P.A. and then further appeal before the Hon'ble Supreme Court. Apart from this, merely because decision of an authority is subject to appeals, the statutory remedies providing alternative remedies cannot be allowed to be by passed or circumvented. The legislature would have been aware of the position of law that the decision given by the Labour Court or Industrial Tribunal may be subject to appeal or ultimate recourse to this Court under Article 226/227 of the Constitution or the Hon'ble Supreme Court under Article 136 of the Constitution and still a specific provision has been made providing a redressal forum for adjudication of industrial disputes

under the Act 1947. The other reason given is equally of without any substance. The petitioners have come up with the case that they have to spent in the said litigation more than what ultimately or eventually they would gain, but nothing material has been produced on this point nor it is understandable how this impression, the petitioners are carrying. As stated earlier, the remedy provided under the industrial legislation is cheaper and effective comparing to other remedies provided by way of civil suit or petition under Article 226 of the Constitution. Naturally the Act 1947 has been enacted by Parliament for the benefits of low paid workmen and that remedy has been provided though other remedies were available, knowing well in its wisdom that it is cheaper and speedy remedy for this class of persons.

11. Normally this Court would not interfere directly in the writ jurisdiction resorted by the petitioners without having recourse to alternative remedy available under the statute. In such case, this Court directs the parties to have recourse to the alternative remedy available under the statute. Where adequate remedy can be read in statute, plea of resorting to writ remedy under Article 226 or 227 of the Constitution must be discouraged. Reference in this respect may have to the decision of Hon'ble Supreme Court in the case of Shyam Kishore v. Municipal Corporation, Delhi, reported in 1993(1) SCC 22. For adjudication of the dispute regarding violation of Section 25F of the Act 1947, alleged to be made while terminating the services of the petitioners, the effective remedy is by way of raising of industrial dispute and a reference thereof to the Labour Court or Industrial Tribunal. That remedy is more effective and lesser time consuming and cheaper. There the parties have sufficient opportunity to produce the evidence on the question of facts in the form of oral and documentary evidence. There are many questions of fact in such matters which can only be adjudicated by taking evidence of the parties. In the writ jurisdiction this Court does not take the evidence nor the disputed questions of facts can be gone into by this Court under Article 226 of the Constitution of India.

12. In the matter where the grievance has been made that the retrenchment has been made of the workmen without making compliance of the provisions of Section 25F of the Act 1947, is a question of fact and since in order to arrive at a conclusion or for recording a finding, some investigation/enquiry that has to be embarked upon, would be beyond purview of Article 226 of the Constitution of India. In the case of K.D.Rashid v.

Income-tax Investigation Commission and others, reported in AIR 1954 SC 207, the Apex Court has observed that the remedy provided for in Article 226 of the Constitution is a discretion remedy and the High Court has always t....R

that the aggrieved party can have an adequate or suitable relief elsewhere. The next case to be referred is Union of India v. T.R. Verma reported in AIR 1957 SC 882. In this case the service of the respondent therein was terminated and challenge has been made to the order of termination of services by the respondent by filing a writ petition under Article 226 of the Constitution before the Punjab High Court. The High Court has accepted the Special Civil Application. The Union of India appealed to the Hon'ble Supreme Court and the judgment of the High Court was set aside by the Apex Court on the ground of availability of alternative remedy and in this connection, I would like to refer to the observations made by Apex Court.

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13. In the case of State of U.P. v. Mohammed Nooh, reported in AIR 1958 SC 86, the Apex Court has observed that "the fact that the aggrieved party has another and adequate remedy may be taken into consideration by the superior court in arriving at a conclusion as to whether it should, in exercise of its discretion, issue a writ of certiorari to quash the proceedings and decision of inferior courts subordinate to it and ordinarily the superior court will decline to interfere until the

aggrieved party has exhausted his other statutory remedies, if any."

14. The case of Basant Kumar Sarkar and other v. Eagle Rolling Mills Ltd. and others, reported in AIR 1964 SC 1260, also relate to an industrial dispute and as such, I would like to refer to the facts giving rise to this case. In the said case, the validity of Section 1(3) of the Employees' State Insurance Act, 1948 was challenged before the Patna High Court by the workmen of the Company on the ground that the aforesaid section was violative of Article 14 of Constitution and suffers from the vice of excessive delegation. Certain notices were issued to the workmen curtailing their benefits. The validity of the Act was upheld but the Apex Court held that the proper course for the workmen was to challenge the notices and the circulars under Section 10 of the Industrial Disputes Act or under Sections 74 and 75 of the Employees' State Insurance....R

connection, I would like to refer to the following observations of the Apex Court:

"Before we part with these appeals, there is one more point to which reference must be made. We have already mentioned that after the notification was issued under S.1(3) by respondent No.3 appointing August 28, 1960 as the date on which some of the provisions of the Act should come into force in certain areas of the State of Bihar, the Chief Executive Officer of respondent No.1 issued notices giving effect to the State government's notification and intimating to the appellants that by reason of the said notification, the medical benefits which were being given to them in the past would be received by them under the relevant provisions of the Act. It was urged by the appellants before the High Court that these notices were invalid and should be struck down. The argument which was urged in support of this contention was that the respondent No.1 in all the three appeals were not entitled to curtail the benefits provided to the appellants by them and that the said benefits were not similar either qualitatively or quantitatively to the benefits under the Scheme which had been brought into force under the Act.

The High Court has held that the question as to whether the notices and circulars issued by the respondents No.1 were invalid, could not be considered under Article 226 of the Constitution; that is a matter which can be appropriately raised in the form of a dispute by the appellants under S.10 of the Industrial Disputes Act. It is true that the powers conferred on the High Courts under Article 226 are very wide, but it is not suggested by Mr.Chatterjee that even these powers can be taken in within their sweep industrial disputes of the kind which this contention seeks to raise. Therefore, without expressing any opinion on the merits of the contention, we would confirm the finding of the High Court that the proper remedy which is available to the appellants to ventilate their grievances in respect of the said recourse to Section 10 of the Industrial Disputes Act, or seek relief, if possible under Ss. 74 and 75 of the Act."

15. The remedy provided for violation of Chapter 5A of the Act 1947 in the Act itself is effective and efficacious remedy. The other contention is that it is a discretion of the State Government to make reference or may not make a reference under Section 10 of the Act 1947, and as such it cannot be said to be effective and efficacious alternative remedy. The further grievance is that since no time limit has been fixed under Section 10 of the Act 1947 for referring a dispute and as such, the said remedy is not effective remedy and the remedy appears to be illusory. In the case of Premier Automobiles Ltd. v. Kamalakar Santa Ram and others, reported in AIR 1975 SC 2238, the Apex Court has observed that, "persons wishing the enjoyment of such rights and wanting its enforcement must rest content to secure the remedy provided by the Act. The possibility that the Government may not ultimately refer an industrial dispute under Section 10 on the ground of expedience is not a relevant consideration in this regard." It is true that there may be occasions when the appropriate government may not refer the dispute expeditiously for its adjudication to the Industrial Redressal Forum, but if considerable delay is made, there is remedy to the affected person to approach this Court in the writ jurisdiction and this Court may issue writ in the nature of Mandamus, directing the appropriate Government to perform statutory obligation conferred on it. The

Industrial Disputes Act, 1947 is a special statute which has been enacted by Parliament for settling industrial disputes through conciliation and if not possible, then by the Labour Court/Tribunal constituted under the Act, and also to reduce the field of conflict between the workmen on one hand and the management on the other, in order to increase industrial growth of the country. This statute is a self contained statute and provides complete procedure and even machinery has been provided for recovering the money due from the employer to the employee and a reference in this respect may have to the provisions of Section 33C of the Act 1947. The justification given to approach directly to this Court that in the present case the statutory provisions have been breached by the respondents and as such, to get all things right by intervention of this Court they have approached this Court directly without availing the alternative remedy available, is hardly of any substance. Even where the question is raised as to breach of statutory provisions in making termination of services of the petitioners, the same is also a question of fact which requires investigation. Even in the cases where a plea has been taken that the orders are wholly without jurisdiction and are passed in flagrant violation of principles of natural justice, there may not be any justification in the action of the petitioners to approach this Court directly where statutory alternative remedy is available. the question whether the principles of natural justice have been complied with before passing the impugned orders or not as well as whether the order is without jurisdiction, are also essentially questions of fact and require investigation before reaching conclusion and that investigation or inquiry, in my view, is normally beyond the scope of Article 226 of the Constitution of India and these questions can be suitably and effectively agitated and adjudicated upon by the Labour Court or Industrial Tribunal constituted under the Act 1947, as the case may be, to which reference is made, on the basis of evidence adduced by parties. I am therefore of the opinion that where grievance has been made against the order of termination of services of workmen on the ground of violation of statutory provisions or principles of natural justice or lack of jurisdiction, in such cases, normally the rule for workmen should be to avail alternative remedy provided under statute and entertainment of writ petition by this Court under Article 226 of the Constitution of India without exhausting remedies should be with great care and caution and in very exceptional cases. So the alternative efficacious remedy was available to the petitioners in the matter but they have chosen to

approach this Court directly under Article 226 of the Constitution of India for which I do not find any justification or any reasonable cause. The reasons which have been given by the petitioners to justify their action to approach this Court directly under Article 226 of the Constitution circumventing the alternative remedy available to them under the Act 1947, are hardly of any substance. However, this petitions have been filed in the year 1983 and at this stage now if the petitioners are relegated to the remedy of raising industrial dispute, it may not be proper course, moreso when there is no dispute that some of the petitioners have completed 240 days in twelve calendar months preceding the date of termination and while terminating their services, the provisions of Section 25F of the Act 1947 have not been complied with. This course is adopted in this case in the peculiar facts of the case, otherwise this Court, even at this stage may decline to exercise its discretion in the matter and to entertain the writ petitions in the matter where alternative efficacious remedy is available under the statute.

16. Re.: Construction of Dam, by State Government  
through Irrigation Department, is  
sovereign function:

In support of this contention, the learned counsel for the respondents placed reliance on decision of Hon'ble Supreme Court in the case of Chief Conservator of Forests & Anr. v. Jagannath Maruti Kondhare & Ors., reported in (1996) 2 SCC 293 and of this Court in the case of Vinodrai N. Ratnotar v. State of Gujarat, reported in 1993(2) GLR 1490. While dealing with the question of exclusion of soveriegn functions of the State fro....R

has observed as under:

12. We may not go by the labels, Let us reach the hub. And the same is that the dichotomy of sovereign and non-sovereign functions does not really exist -- it would all depend on the nature of the power and manner of its exercise, as observed in para 23 of Nagendra Rao case (JT (1994) 5 SC 572). As per the decision in this case, one of the tests to determine whether the executive function is sovereign in nature is to find out whether the State is answerable for such

action in courts of law. It was stated by Sahai, J. that acts like defence of the country, raising armed forces and maintaining it, making peace or war, foreign affairs, power to acquire and retain territory, are functions which are indicative of external sovereignty and are political in nature. They are, therefore, not amenable to the jurisdiction of ordinary civil court inasmuch as the State is immune from being sued in such matters. But then, according to this decision the immunity ends there. It was then observed that in a welfare State, functions of the State are not only the defence of the country or administration of justice or maintaining law and order but extends to regulating and controlling the activities of people in almost every sphere, educational, commercial, social, economic, political and even marital. Because of this the demarcating line between sovereign and non-sovereign powers has largely disappeared.

16. The aforesaid being the crux of the scheme to implement which some of the respondents were employed, we are of the view that the same cannot be regarded as a part of inalienable or inescapable function of the State for the reason that the scheme was intended even to fulfil the recreational and educational aspirations of the people. We are in no doubt that such a work could well be undertaken by an agency which is not required to be even an instrumentality of the State.

17. This being the position, we hold that the aforesaid scheme undertaken by the Forest Department cannot be regarded as a part of the sovereign function of the State, and so, it was open to the respondents to invoke the provisions of the State Act. We would say the same qua the social foresting work undertaken in Ahmednagar District. There was, therefore, no threshold bar in knocking the door of the Industrial Courts by the respondents making a grievance about adoption of unfair labour practice by the

appellants."

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In the case of Vinodrai N. Ratnotar v. State of Gujarat (supra), the facts were that the petitioner therein was appointed for a period of three months as a workcharge peon by an order passed by Dy.Secretary, (Department of Industries, Mines and Energy Board). On expiry of his tenure, he was once again appointed with effect from 1st February 1981, for 29 days. Thereafter he was again appointed for a period of three months. So in the similar manner, different orders passed on different dates continued to be issued keeping the petitioner in employment. The dispute arose when the petitioner was ordered to be relieved with effect from 23rd April 1984. The case of the petitioner was that his retrenchment was illegal and void ab-initio as it has been made without complying with provisions of Section 25F of the Act....R

for the petitioner was that the State of Gujarat in the Department of Industries, Mines and Power is an 'industry' within the meaning of Industrial Disputes Act, 1947 and for this reason the provisions of Section 25F would apply to the petitioner who was a 'workman' within the meaning of the said Act. In para-9 & 10 of this judgment, this Court has observed thus:

"In the facts of the present case we are of the opinion that the Governmental function of administration cannot possibly be regarded to be a welfare activity or an economic adventure undertaken by the Government. Administration, particularly in the field of implementing the policy of the State Government in relation to industries and with a particular view to monitor, regulate and encourage such industries within the framework of the existing law, is undoubtedly a sovereign function, which is one of the recognised exceptions, as discussed in the various decisions of the Supreme Court referred to hereinabove.

We must also turn down the contention of the learned counsel for the petitioner that even if such an administrative function can be regarded to be a sovereign function, the Department of Industries, Mines and Power, where the petitioner was serving, amounts to forming a part of the

group of industries to which service is rendered by the administration, and thus, is severable from the notable exception of the sovereign function. We have already discussed hereinabove that, merely because the administration is aimed at the industries of the State does not make such administration an industrial activity.

was posted at the relevant point of time in the Department of Industries, Mines and Power does not counter the fact that he was part of the administrative staff of the Government Secretariat and, therefore, part of the administration."

17. This case is clearly distinguishable as the petitioners were employed on a project of construction of Dam by Irrigation Department and not in a Department where administration functions with regard to the Irrigation Department were carried on. Moreover, this issue was directly there in the case of P.W.D. Employees' Union v. State of Gujarat, (supra), where the Court had occasion to consider whether the activities of the Government of construction of Dam by its Department are sovereign functions or not. The matter is squarely covered under the aforesaid decision of this Court and as such, the second preliminary objection raised by the learned counsel for the respondents is not tenable and cannot be accepted. The said decision is discussed in detail hereinbelow.

18. Before proceeding to decide the matter on merits, I consider it to be appropriate to first make a reference to the decisions on which the learned counsel for the petitioners placed reliance in support of his contentions. The first decision relied upon by the learned counsel for the petitioners is of this Court in the case of P.W.D. Employees' Union v. State of Gujarat, reported in 1986 GLH 1024. the question for consideration before this Court in the aforesaid case was as to whether the daily rated workers on the nominal muster roll of the Public Works Department (Irrigation) engaged for the purpose of diverse works in connection with construction and maintenance of medium size irrigation dam undertaken by the State Government can be said to be workmen within the definition of the term as given in Section 2(s) of the Act 1947. Further question for consideration was whether for the construction and maintenance of the irrigation dams, was the State Government an 'industry' within the meaning of Section

2(j) of the Act, 1947. The Deputy Executive Engineer, incharge of different divisions of the Project, engaged from time to time, daily rated workers under the oral orders and the petitioners were engaged, except the Union. The petitioners' services were terminated and as such, they filed alongwith Union, a writ petition before this Court challenging their termination. The terminations have been impugned broadly on two grounds, namely, these were bad in law and void ab-initio in as much as they were passed in clear violation of mandatory provisions contained in Section 25F of the Act 1947 and secondly in any case, they were arbitrary and discriminatory and therefore violative of Articles 14 and 16 of the Constitution of India. The contention of the respondent therein was that the construction and maintenance of the dam cannot be said to be an industry and therefore beyond purview of the Act 1947, because it is in exercise of sovereign functions that the State undertakes construction of dam for the purpose of irrigation in pursuance of legislative entry No.17 of list 2 of schedule 7 to the Constitution and secondly that the petitioners being daily rated workers engaged for casual purpose having regard to the exigency of work and placed on nominal muster roll cannot claim any right for continuation of their services since the State can always terminate the services on completion of job for which they were engaged. Relying on three Supreme Court decisions, namely, Bangalore Water Supply v. A. Rajappa (AIR 1978 SC 549), Corporation of the City of Nagpur v. Its Employees (AIR 1960 SC 675), and The State of Bombay v. Hospital Majdoor Sabha (AIR 1960 SC 610), it was held that the work of construction and maintenance of irrigation of dams by the State government is industry within the meaning of Section 2(j) of the Act 1947 and on the second question also, the Court has decided the matter in favour of the petitioners and they were held to be workmen. It was found to be a case where the services of the petitioners were terminated without making compliance of the provisions of Section 25F and as such, the termination of the services was declared to be illegal and termination orders were quashed and set aside.

19. The next case is of Punjab and Haryana High Court in the case of The Kapurthala Central Co-operative Bank Ltd., Kapurthala v. The Presiding Officer, Labour Court, Julundur & ors., reported in 1984(II) Labour and Industrial Cases, 974. That was a case where the Court has found it to be a case of unfair labour practice, though the workmen have not completed 240 days in twelve calendar months preceding the date of termination. The

Court has held that the practice of retrenching workmen, who worked for years in order to frustrate his attaining rights under Chapter VA of the Act 1947, is unfair labour practice, unless there are reasons with the employer, with regard to the conduct and services of the workmen be unsatisfactory. That case is of little help to the petitioner as the services of many of the petitioners were terminated after completion of 240 days, in the present case.

20. In the case of Ramasamuz Narsing Upadhyaya v. Vinubhai M. Mitra, reported in 1982(II) LLJ 186, the question before the Bombay High Court was that the adjudication of lay off compensation of the amount payable as retrenchment compensation merely on the ground that during some years in a long period of services, the workman had not worked for 240 days, is correct or not. The petitioner in this case was in employment of respondent-Mill between January 1945 and April 1975. He tendered his resignation in the month of April 1975, under voluntary retirement scheme. ON retirement, the Company paid the petitioner, an amount of Rs.3,260/towards the retrenchment compensation, whereas the petitioner claimed that he was entitled for a sum of Rs.8,800/-. To recover the balance amount, the petitioner therein filed application under Section 33(C)(2) of the Act 1947 before the Labour Court. Prayer has been made that he is entitled for retrenchment compensation as per the provisions of Section 25F of the Act 1947. The application was resisted by the Management. The contention was that the petitioner's services were interrupted, as the petitioner left the services in the year 1958 and was re-employed. It has further been contended that the petitioner had not worked for a period of 240 days every year in the years 1948, 1958, 1965, 1967, 1971 and 1974, and as such, he could not be deemed to be in continued services as contemplated by Section 25B of the Act 1947. The Labour Court has accepted the claim of the management that the petitioner did not work for a period of 240 days every year in eight years during the services. The claim of the petitioner made, that he was in continued services was not accepted. The Court considered the matter in the facts of the case and held that the mere fact that during some years in his long period, the workman had not worked for 240 days is not a sufficient answer to deprive him the retrenchment compensation by ignoring the entire period. The contingency which demands the workers to work for a period of 240 days as provided by Sub Section 2 of Section 25B of the Act 1947 would come into play provided the workman is not in continued services as required

under Section 25B(i) of the Act 1947. That case is also hardly of any help to the petitioners because the question therein was altogether different than that which has been raised by the petitioners in these Special Civil Applications.

21. The last case is of the Hon'ble Supreme Court in the case of The Workmen of American Express International Banking Corporation v. The Management of American Express International Banking Corporation, reported in 1985(2) LLJ 539. The question for consideration in the aforesaid case was, "whether the Sundays and other holidays should be treated days of 'Actual Work'". The Hon'ble Supreme Court held in that case that, "Section 25F of the Act 1947 is plainly intended to give relief to retrenched workmen. The expression "actually worked under the employer" cannot mean those days only when the workmen worked with the hammer, sickle or pen but must necessarily comprehend all those days during which he was in the employment of the employer and for which he had been paid wages either under express or implied contract of service or by compulsion of statute, Standing orders, etc. The explanation to Section 25B(2) is only clarificatory and cannot be used to limit the expanse of the main provision. It cannot be said that only those days which are mentioned in the explanation should be taken into account for the purpose of calculating the number of days on which the workmen had actually worked, though he had not so worked and not other days". If the expression, "actually worked under the employer" is capable of comprehending the days during which the workman was in employment and was paid wages, there is no reason as to why the expression should be limited by the explanation. Any other meaning to the expression "actually worked under the employer" would frustrate the object of Section 25F. So the ratio laid down by the Hon'ble Supreme Court in the said case is that Sundays and other holidays should be treated days of "actual work" for the workman who had been paid wages either under express or implied contract of service or by compulsion of statute. So only in those cases of employment, where the employer has to pay wages to the employee for Sundays and other holidays, under express or implied contract of service or by compulsion of statute, for computation of 240 days service within twelve months preceding the date of termination, Sundays and weekly holidays can be counted, but not in other cases. In the present case admittedly, the petitioners were appointed on daily wages. So they have been paid for the days on which they worked but there is nothing on record, produced, by the petitioners that there was express or

implied contract for payment of wages for Sundays and holidays. The petitioners have also not made reference to any statute under which statutory obligation was put upon the employer to pay wages to the petitioners, the daily wagers, for Sundays and other holidays.

22. There is no dispute that the petitioners No.1, 6, 8, 10, 13, and 17, in Special Civil Application No.3006 of 1983, have worked for 240 days during twelve months preceding the date of termination, and further as stated earlier, there is also no dispute that while terminating their services, the respondents have not made compliance of provisions of Section 25F of the Act 1947. So the termination of these petitioners is void ab-initio. Similarly, there is no dispute that the petitioners in Special Civil Application No.4174 of 1983 have also worked for more than 240 days during the twelve months preceding the date of termination and while terminating their services also, the respondents have not complied with provisions of Section 25F of the Act 1947. The other petitioners in Special Civil Application No.3006 of 1983 have not completed 240 days in twelve months preceding the date of termination and as such, while terminating their services, compliance of provisions of Section 25F of the Act 1947 was not required to be made. Therefore, on the ground as alleged by the petitioners, their termination cannot be accepted to be void ab-initio or illegal. The contention of the learned counsel for the petitioners, that as these petitioners have completed 240 days in earlier years their termination was illegal and void ab-initio, cannot be accepted. Section 25F of the Act 1947 is required to be complied with only where the workmen concerned has worked for more than 240 days during the twelve months preceding the date of termination. So the writ petition of the petitioners No.4, 5, 7, 9, 11, 12, 14, 18, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, & 31, is dismissed as they have not completed 240 days work in twelve months preceding the date of their termination.

23. Now I may advert to the contentio.T....R

counsel for the respondents that the relief of reinstatement should not be granted as the project on which the petitioners were engaged has already come to an end in the year 1986. In support of this contention, the learned counsel for the respondents placed reliance on decision of the Hon'ble Supreme Court in the case of State of Himachal Pradesh v. Suresh Kumar Verma, reported in AIR 1996 SC 1565. It is advantageous to reproduce the judgment of the Hon'ble Supreme Court in

the aforesaid case:

2. We have heard the counsel on both sides. This appeal by special leave arises from the orders passed by the High Court of Himachal Pradesh. In this case in C.W.P. No.722/93 dated 10.9.1993, the Division Bench of the High Court has disposed of the matters on the ground that the respondents were engaged as Assistant Development Officers on daily wages pursuant to the direction by it. It is settled law that having made rules of recruitment to various services under the State or to a class of posts under the State, the State is bound to follow the same and to have the selection of the candidates made as per recruitment rules and appointments shall be made accordingly. From the date of discharging the duties attached to the post the incumbent becomes a member of the services. Appointment on daily wage basis is not an appointment to a post according to the Rules.

3. It is seen that the project in which the respondents were engaged had come to an end and that, therefore, they have necessarily been terminated for want of work. The Court cannot give any directions to re-engage them in any other work or appoint them against existing vacancies. Otherwise, the judicial process would become other mode of recruitment dehors the rules.

4. Mr.Mahabir Singh, learned counsel for the respondents contended that there was an admission in the counter-affidavit filed in the High Court that there were vacancies and that, therefore, the respondents are entitled to be continued in service. We do not agree with the contention. The vacancies required to be filled up in accordance with the rules and all the candidates who would otherwise be eligible are entitled to apply for when recruitment is made and seek consideration of their claims on merit according to the Rules for direct recruitment along with all the eligible candidates. The appointment on daily wages cannot be a conduit pipe for regular appointments which would be





may be on daily wages. In the facts and circumstances of this case, interest of justice will be met in case the respondents are directed to pay to petitioners No.1, 6, 8, 10, 13, & 17 in Special Civil Application No.3006 of 1983, full back wages for the period from the date of their termination of their services till the date of completion of project work of Karjan Dam and equal amount as compensation in lieu of reinstatement. These petitioners were daily wagers and therefore the wages for the purpose of calculation of the amount to be paid as back wages and compensation in lieu of reinstatement cannot be taken to be 365 days. However, it is also equally difficult to find out the actual days of work of these petitioners during the period in dispute. Interest of justice will be met in case, for the purpose of working out and calculation of the amount of backwages and the compensation in lieu of reinstatement, their actual working days from 21st June 1982 to 20th June 1983 are taken as base. The actual working days of these petitioners have been given by respondents in the annexure to further affidavit-in-reply, which is at page 54, and the same may be taken for the purpose of working out and the calculation of the aforesaid amount.

25. Similarly, the petitioners in Special Civil Application No.4174 of 1983 are also entitled for the same relief. However, in their cases, the period of working was given out by the petitioners from the date of employment till the date of their termination and as such, it is difficult to conclude for how many days they have actually worked during the twelve months preceding the date of their termination. In their cases, interest of justice will be met in case, for the purpose of working out and the calculation of backwages and the amount of compensation in lieu of reinstatement, their working days be taken to be 240 in twelve months or one year.

26. The aforesaid two components of amounts to be paid to these petitioners are to be worked out and determined on the aforesaid basis. In the result, these Special Civil Applications are disposed of in aforesaid terms. Rule stands discharged in Special Civil Application No.3006 of 1983 so far as the petitioners No.4, 5, 7, 9, 11, 12, 14, 18, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, & 31 are concerned. Rule is made absolute in aforesaid terms so far as petitioners No.1, 6, 8, 10, 13, & 17 in Special Civil Application No.3006 of 1983 are concerned. Rule in Special Civil Application No.4174 of 1983 is made absolute in aforesaid terms. No order as to costs.

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(sunil)